

BEFORE THE
COUNTY OF SACRAMENTO
ENVIRONMENTAL MANAGEMENT DEPARTMENT
STATE OF CALIFORNIA

In the Matter of the Penalty Order Issued to:

WARING'S DUMP
SWIS #34-CR-5017
APN's 038-0202-001; 038-0182-005; and
038-0182-010

KRISHNA LIVING TRUST;
RAGHVENDRA SINGH,

Appellant.

OAH No. N2007040062

DECISION

On May 23, June 25, June 26, June 27, and July 13, 2007, in Sacramento, California, Catherine B. Frink, Administrative Law Judge, Office of Administrative Hearings, heard this matter serving as a Hearing Officer pursuant to Public Resources Code section 44308.

Raghvendra Singh (appellant) appeared on behalf of the Krishna Living Trust, Raghvendra Singh and Kiran Rawat, as trustees.

John E. Reed, Deputy County Counsel, County of Sacramento, represented the County of Sacramento Environmental Management Department, State of California (EMD). The County's representative, Lisa Todd, Supervising Environmental Health Specialist, was present.

Evidence was received and the record was held open for submission of closing arguments. EMD's Closing Brief was received on July 24, 2007 and was marked as Exhibit HH. Appellant's Closing Brief was received on August 13, 2007, and was marked as Exhibit 27. EMD's Reply Closing Brief was received on August 24, 2007, and was marked as Exhibit II. The record was closed and the matter submitted on August 24, 2007.¹

¹ On August 22, 2007, the Office of Administrative Hearings received a fax from appellant, addressed to the Administrative Law Judge and Mr. Reed, which was marked as Exhibit 28 for identification only. On September 4, 2007, the Office of Administrative Hearings received a two-page fax from appellant, which was marked as Exhibit 29. The first page was a duplicate of Exhibit 28; the second page was entitled "Reply Arguments." Both Exhibit 28 and Exhibit 29 appear to reiterate issues raised in Appellant's Closing Brief and in a fax submitted by appellant on July 16, 2007, marked as Exhibit 26. Neither Exhibit 28 nor Exhibit 29 was separately considered for any purpose herein.

PRELIMINARY MATTER

At the conclusion of the hearing on July 13, 2007, appellant was given the opportunity to provide case citations in connection with appellant's Exhibits 10 and 11. Appellant was ordered to submit the citations by close of business on July 16, 2007, or the documents would not be considered. On July 16, 2007, appellant submitted a document, which was marked as Exhibit 26. This document contained a citation to *U.S. v. W.R. Grace & Co.* (2005) 429 F.3d 1225, which pertained to Exhibit 10. Appellant provided no citation for Exhibit 11, which he identified at hearing as an unpublished decision. Consequently, Exhibit 11 is not in evidence, and is not considered for any purpose herein.

ISSUES PRESENTED²

1. Did the EMD have jurisdiction to issue the January 28, 2005 Notice and Order and/or the March 7, 2007 Notice of Penalty Assessment?
2. Are appellant's objections to the January 28, 2005 Notice and Order waived by the fact that appellant did not file a timely appeal of said Notice and Order?
3. Did the EMD act properly in issuing the March 7, 2007 Notice of Penalty Assessment?
4. Were the penalty amounts assessed in the March 7, 2007 Notice of Penalty Assessment appropriate?

FACTUAL FINDINGS

Jurisdiction of the EMD

1. The County of Sacramento EMD is a local enforcement agency (LEA) for the State of California Integrated Waste Management Board (CIWMB or Board)
2. The Public Resources Code (PRC), Division 30, governs the regulation of waste management in California. EMD, as a LEA, is authorized by PRC section 43209 and Title 14, California Code of Regulations (14 CCR), sections 18051 and 18084 as the enforcement agency for Solid Waste Code Enforcement in Sacramento County. Part 7, Article 2.5, defines the LEA's jurisdiction over burn dump sites, the cooperative effort to be employed by the LEA, the CIWMB, the Department of Toxic Substances Control (DTSC) and the State Water Resources Control Board (SWRCB or Water Board), as well as the LEA's authority to enforce

² In a document treated by EMD as a Statement of Issues, appellant listed 19 "Reasons for Having No Enforcement Action for Waring's Dump." These matters will be individually addressed in the Legal Conclusions under the general categories set forth in the "Issues Presented."

provisions of Division 30 of the PRC in bringing burn dump sites into compliance with applicable statutes and regulations.³

3. In October of 1993, the Legislature enacted the Solid Waste Disposal and Codisposal Site Cleanup Program (Pub. Resources Code, § 48020 et seq.) (AB2136).⁴ PRC section 48022 states:

The Legislature finds and declares all of the following:

(a) Pursuant to the legal framework and definitions pertaining to solid waste contained in this division, the board and the local enforcement agencies have general authority and responsibility for responding to environmental conditions at solid waste disposal sites to ensure protection of the public health and safety and the environment.

(b) The definitions of "solid waste," "solid waste disposal," and "solid waste landfill" establish some of the parameters for the general authority and responsibility of the board and the local enforcement agencies.

(c) The Solid Waste Disposal and Codisposal Site Cleanup Program established under this article establishes a mechanism for funding the cleanup of solid waste disposal sites and the solid waste at codisposal sites under specified conditions and circumstances.

(d) A burn dump site is a solid waste disposal site and, as such, is a site that is eligible for funding pursuant to the program, provided all other criteria for program eligibility are met.

(e) Pursuant to the Health and Safety Code, the Department of Toxic Substances Control has general jurisdiction, authority, and responsibility regarding hazardous substance release sites.

(f) Pursuant to the Water Code, the State Water Resources

³ The "regulatory overlap, conflict, and duplication" between the CIWMB and the SWRCB, and between the CIWMB and LEAs, was recognized by the Legislature in PRC section 43101, effective October 1, 1993, which resulted in the enactment of the Solid Waste Disposal Regulatory Reform Act of 1993 (Pub. Resources Code, § 43100 et seq.) to reform and streamline the state's solid waste disposal regulatory process.

⁴ The purpose of AB2136 was to provide funding for the cleanup of solid waste disposal sites and to seek repayment of funds expended pursuant to its provisions from responsible parties to the extent feasible, including by imposition of a lien on the real property owned by a responsible party that is subject to the remedial action (Pub. Resources Code, §§ 48023 and 48023.5)

Control Board and the regional water quality control boards have general jurisdiction, authority, and responsibility regarding protection of the waters of the state, including, but not limited to, solid waste and hazardous waste discharges.

(g) Most burn dump sites impact multiple media. Burn dump sites usually contain hazardous substances and, therefore, most can be characterized generally as hazardous substance release sites. Burn dump sites also contain predominantly solid waste and, therefore, can be characterized generally as solid waste disposal sites. Some burn dump sites impact, or have the potential to impact, waters of the state.

(h) Burn dump sites are presumed to be solid waste disposal sites, subject to the general authority and responsibility of the board and the local enforcement agencies. In addition to this general presumption, it is the intent of the Legislature to require that the procedures set forth in Section 48022.5⁵ be followed to ensure

⁵ PRC section 48022.5 states:

(a) For the purposes of this section, the following terms have the following meanings, unless the context clearly requires otherwise:

(1) "Burn dump site" means a solid waste disposal site that meets all of the following conditions:

(A) Was operated prior to 1972.

(B) Is closed.

(C) Prior to closure, was a site where open burning was conducted.

(2) "Department" means the Department of Toxic Substances Control.

(3) "Regional board" means a California regional water quality control board.

(4) "Remediation oversight agency" means the entity responsible for environmental oversight on a burn dump site remediation project.

(5) "Sensitive land use" means either of the following:

(A) Use for residences, schools, day care facilities, hospitals and hospices, and other facilities or structures that have a high density of occupation on a daily basis.

(B) Use as a park, golf course, or any other, similar open-space area that is made available for public use, when the park, golf course, or open-space area has a potential for human exposure to hazardous substances.

(b) On or before June 30, 2003, the department, in consultation with the board and the State Water Resources Control Board, shall develop protocols to be utilized by the board and the local

enforcement agencies for site investigation and characterization of hazardous substances at burn dump sites.

(1) The protocols shall include, but need not be limited to, both of the following items:

(A) Sampling and analysis protocols to be utilized by the board and the local enforcement agencies for site investigation and characterization of hazardous substances at burn dump sites.

(B) Appropriate abatement measures for nonsensitive land uses.

(2) In addition, the protocols may include either or both of the following items:

(A) Cleanup guidelines, levels, or thresholds for one or more typical constituents of concern based on nonsensitive land uses.

(B) Specifications for confirmation sampling on partial and complete clean-closed sites.

(c) Whenever the board receives an application for funding under this article for a burn dump site, the board shall use the protocols developed by the department under subdivision (b) to investigate and characterize hazardous substances at the site.

(d) Once sufficient site information is available, the board shall notify the department and the appropriate regional board of the board's interest in providing funding and remediation oversight for the site.

(e) For a nonsensitive land use site, the board shall proceed as the remediation oversight agency, following the notification required under subdivision (d), unless the department or regional board requests a site consultation meeting under subdivision (g).

(f) For an existing or proposed sensitive land use site, the board shall request a site consultation meeting under subdivision (g).

(g) For sites with existing or proposed sensitive land uses or water quality impacts, or where otherwise requested by the department or a regional board, the board, the department, the State Water Resources Control Board, and the appropriate regional board shall hold a site consultation meeting to determine which agency will provide remediation oversight. If, following a review of the site information, the department or a regional board requests to provide remediation oversight, that request shall be granted. If the department or a regional board does not request to provide remediation oversight, remediation oversight of the site shall remain with the board. In cases where the board requested the meeting, the determination of remediation oversight agency shall be made within 30 days of the board's request for the meeting.

(h) The board may require the imposition of an environmental restriction on any burn dump site where solid waste or residuals from the burning of solid waste is left in place. The environmental restriction shall meet the requirements described in Section 1471 of the Civil Code, and the restrictions shall run with the land.

(i) On or before March 30, 2003, the board and the department shall enter into an agreement relating to the funding of any activities of the department appropriately conducted pursuant to this section.

(j) Nothing in this section is intended to limit the authority of the board, the department, the State Water Resources Control Board, or a regional board pursuant to other provisions of law.

that hazardous substances and hazardous wastes at burn dump sites are adequately characterized and safely managed and remediated in consultation with, or under the direct oversight of, the department or the appropriate regional water quality control board, or both.

4. Pursuant to PRC section 48022.5, subdivision (b), DTSC, in consultation with CIWMB and the Water Board, adopted the Protocol for Burn Dump Site Investigation and Characterization, dated June 30, 2003 (Burn Dump Protocol). Figure 1 of the Burn Dump Protocol, entitled "Process for Identification of Lead Remediation Oversight Agency at California Burn Dump Sites," depicts the overall process for burn dump site evaluation and determination of the lead agency for remediation oversight.

5. Chapter 1.1 of the Burn Dump Protocol states, in part:

In the early 1970s, the burn dumping process was phased out in response to the Clean Air Act Amendments. Today most burn dumps are considered closed sites as their operations ceased prior to the development of specific regulations addressing the closure of disposal facilities. Burn dump sites not operated under applicable permits at the time are considered illegal disposal sites. Currently, there have been approximately 500 burn sites identified within the 2,500 solid waste sites identified in the Closed Illegal and Abandoned (CIA) Site Program of the CIWMB. These sites are listed in the Solid Waste Information System (SWIS) database compiled by CIWMB....Burn dump sites identified in the SWIS and under the CIA Site Program⁶ undergo continued monitoring and inspection. Additional sites not included in SWIS are continually identified; many of these sites include burn dump sites.

6. Chapter 1.3 of the Burn Dump Protocol contains the following definition of "Burn Dump:"

For the purposes of this document and as stated in AB709, a "burn dump site" shall be defined as a closed, solid waste disposal site, where open burning was conducted prior to 1972. A "closed" site shall be defined as a non-active solid waste disposal facility or site which operated and ceased accepting waste prior to implementation of environmental regulatory closure requirements

(k) Nothing in this section is intended to preclude any qualifying entity from applying for and receiving funding assistance under any other provision of law.

⁶ Site Identification Program (SIP).

or standards (1972) and does not include illegal or abandoned sites.

7. Chapter 1.5 of the Burn Dump Protocol discusses regulatory authority and jurisdiction, and states in part:

Burn dump sites are typically classified as solid waste disposal sites. Depending on the environmental characteristics found at a particular burn dump site, the site may fall under the regulatory jurisdiction of the CIWMB (including LEAs), DTSC and/or the SWRCB (including the RWQCBs).⁷

California law does not specify that any one agency has jurisdiction over solid waste sites. However, the law is clear that only DTSC and the RWQCBs have authority over hazardous substance releases and can "certify" a hazardous substance cleanup as having met state standards and/or requiring no further action.

To date, most of the burn dump sites that have been identified in California have fallen under the regulatory jurisdiction of the CIWMB and LEAs for the purpose of permitting, inspection, abatement of nuisance and immediate contact issues. While CIWMB and LEA authority does not extend to final remediation and "certification" of site clean up, these agencies have been looked to for guidance and assistance for characterization and remediation of burn dump sites to meet state minimum standards.

8. Chapter 1.5.2 of the Burn Dump Protocol describes the regulatory authority and jurisdiction of the CIWMB:

CIWMB's and the LEAs' authority to inspect and investigate burn dumps is contained in Public Resources Code (PRC) Sections 44100, 40122 and 40191. CIWMB involvement in burn dump regulations has primarily been by:

- Providing assistance to LEAs in investigation, evaluation and remediation of burn dump sites. LEAs are agencies primarily responsible for regulating and enforcing state minimum standards, remedial investigation oversight, regular inspection and review of post closure land use; and

⁷ Regional Water Quality Control Boards.

- Participation in remediation and/or abatement of high priority burn dump sites where the responsible parties are unable or unwilling to perform timely cleanup and where there is a threat to public health and safety or the environment. CIWMB may provide technical support and grant money through the Solid Waste Site Cleanup Program and/or the Closed Illegal and Abandoned Site Program.

9. Chapter 7.0 of the Burn Dump Protocol describes the consultation process for selection of a lead regulatory agency for remedial oversight. It confirms that, "[i]t is likely that a LEA or the CIWMB will act as the lead regulatory agency through completion of the PWCS."⁸ However, "for sites with existing or proposed sensitive land uses or water quality impacts, or where otherwise requested by DTSC, SWRCB or the appropriate RWQCB, the CIWMB, DTSC, SWRCB, and the appropriate regional board shall hold a site consultation meeting to determine which agency will provide remediation oversight....If DTSC, SWRCB or the appropriate RWQCB does not request to provide remediation oversight, remediation oversight of the site shall remain with the CIWMB."

History of Waring's Dump

10. The property known as Waring's Dump is located in the vicinity of 63rd Street and Morrison Creek in Sacramento, California. Current owners include appellant (APN's⁹ 038-0202-001, 038-0182-005, and 038-0182-010); Esther and Lazar Lupsa (Lupsas) (APN's 038-0182-006 and 038-0182-007); and the City of Sacramento (APN's 038-0180-008 and 038-0182-011). Waring's Dump is listed on the CIWMB Solid Waste Information System (SWIS) as number 34-CR-5017.¹⁰

11. Historical documents maintained by EMD indicate that the dump site was created by removal of road rock at the time of construction of Highway 99, resulting in the creation of a large "borrow pit" approximately 50 feet deep and covering approximately three acres. Completion of sewage disposal plants at Mather Field and Signal Depot increased the flow of Morrison Creek, causing seepage to fill the excavated area with water to a depth of 20 to 30 feet, resulting in a hazardous condition. A request by the property owners, Albert and Frances Waring, to fill this pit was granted in the late 1940s, with the understanding that the fill was to be rubbish and construction waste. Complaints were received from residents in the area regarding burning at the Waring Dump site. Mr. Waring operated without a permit, with the understanding between Mr. Waring and the City of Sacramento that, upon request from the City, the dump would be closed.

⁸ Preliminary Waste Characterization Study.

⁹ Assessor's Parcel Number.

¹⁰ The SWIS is a database maintained by CIWMB to track solid waste disposal sites.

12. In the mid-1960s, Morrison Creek's channel was widened, deepened and realigned as part of Sacramento County's flood control "Drainage Bond Project," and an engineered berm now separates it from the disposal site.

13. In a letter to the County of Sacramento, Air Pollution Control District, dated June 11, 1987, Francis B. Dillon, attorney for James and Genevieve Dallosa, stated that "Mr. and Mrs. Dallosa purchased the property"¹¹ in October of 1958 from Albert and Frances Waring. To their knowledge there has been no dumping or solid waste disposal at the site during the term of their ownership nor are they aware of any such activities prior to their acquisition of the property."

14. Houston Tuel and Robert Newton purchased the parcels now owned by appellant between 1980 and 1991. A "squatter" built a shack/garage on one of the parcels in or about 1990. Mr. Tuel and Mr. Newton sold the parcels to appellant in 2001, as reflected in a Grant Deed notarized on October 31, 2001, and recorded. At the time of sale, Mr. Tuel and Mr. Newton gave appellant a copy of an engineering study which showed the dump site to not be hazardous.

15. On September 24, 2002, Tammy Derby, Senior Environmental Health Specialist for the EMD, sent a letter to Mr. and Mrs. Dallosa with regard to APN 038-0182-007, which stated in part:

In September 2002, you contacted Sacramento County Environmental Management Department staff to discuss one of the properties containing Waring's Dump. You requested information regarding regulatory requirements in relation to development of the property. As Local Enforcement Agency (LEA) for solid waste permitting, inspection, and enforcement in Sacramento County, the LEA is responsible for the regulation of closed disposal sites. As a former disposal site, the Waring's Dump is on the LEA's inventory of sites that require potential oversight. Based on the history of site, [sic] the LEA is providing you with information concerning the regulatory requirements you will have to meet in order to develop the site.

16. The EMD informed Mr. and Mrs. Dallosa that, prior to development of the property or any changes in current land use, they were required to provide EMD with a site characterization, consisting of a site investigation work plan which was to be the basis of a field investigation; a closure plan; and a post-closure land use plan.

17. On November 10, 2003, Ms. Derby received an email message from Troy Givans, Business Environmental Resource Center (BERC), Department of Economic

¹¹ Described in the letter as "APN 038-182-06 and 07," currently owned by the Lupsas.

Development. The email referenced the Waring's Dump parcels owned by appellant, and stated, in part:

I have a quick question regarding a closed landfill site (apn: 038-0202-001, 038-0182-005 & 038-0182-010). The owner of the property is trying to build a house and has indicated that there is a 1000 foot buffer for a residence? The facility is closed, are you aware of restrictions that prohibit building near a closed facility?...

Ms. Derby responded by email on November 10, 2003, as follows:

Troy, building on a closed landfill is tricky business. In this case, the site operated (was created) prior to Title 27, California Code of Regulations, landfill regulations. When the regulations were enacted, pre reg sites were put in a different category than active sites. In absence of any post closure land use change, the site is subject to very little regulatory oversight [sic]. When the owner proposes to build on the site, everything changes. The 1000 ft setback is only one of the issues to deal with. The owner will have to perform a site investigation to determine the extent of the fill and characterize the waste, monitor for LF gas, "close" the site in accordance with applicable regs—cap, cover, grading, sloping, appropriate vegetative ground cover. The closure plan has to be reviewed and approved by us, CIWMB, and most likely RWQCB....Also, your client can contact us for further info. The CIWMB folks have some grant money available to remediate old closed, pre reg sites that may be helpful to your client....

18. As a result of the inquiry about possible development of the Waring's Dump site, the EMD requested that the Remediation, Closure and Technical Services (RCTS) Branch of CIWMB perform a Phase I and Phase II investigation to determine appropriate remedial measures necessary to protect public health and safety and the environment. A site investigation of the Waring's Dump was completed, and CIWMB issued a Final Site Investigation Report (SIR) dated March 2004. The SIR was completed in accordance with the Burn Dump Protocol adopted pursuant to PRC section 48022.5, subdivision (b). According to the SIR, "[t]he investigation was conducted in order to : 1) determine the thickness of cover material placed over the waste material at the site; 2) determine the horizontal and vertical extent of waste, and 3) perform sampling and analysis of waste and soil to determine the site's chemical characteristics." The objective of the investigation was "to provide site data that will allow the LEA to determine if additional cover or reconfiguration of the waste is required to protect public health and safety." Under Section 4.1, Findings, the SIR states that a total of 20 trenches were dug over the three-acre parcel, and that "[t]he investigation verified that the site has no cap." The average depth of the waste in the center of the pit was estimated to be approximately 23 feet. Under Section 4. Results and Findings, the SIR noted that trenches were sampled at various depths, and "waste was found in all the trenches including in fill that might

appear native but was not on further investigation, above or adjacent to undisturbed native soils contact." The SIR further stated: "Waste types included: **burned material**, metals, concrete, asphalt, wood waste, cannery waste, glass, plastics, some household waste, oil residue, transformers, insulators, car parts, tires." (emphasis supplied) Water, which was encountered in all trenches, was "oily and appeared grayish black and locally smelled strongly of petroleum and/or hydrocarbon products."

The material sampled contained elevated concentrations of metals compared to background values, with contaminant concentrations exceeding the soluble threshold limit concentration (STLC). In Section 5. Recommendations, CIWMB staff determined that Waring's Dump does not meet state minimum standards for closed disposal sites because "A. The waste disposal area is not covered; B. The site is not graded for drainage; and C. There is evidence of waste exposure caused by erosion."

The SIR concluded:

CIWMB staff concurs with Sacramento County LEA's observations that the site does not meet State Minimum Standards, 27 CCR §20650 (grading of fill surfaces), §20790 (leachate control), and §20820 (drainage and erosion control). CIWMB staff recommends that this report be forwarded to the Department of Toxic Substances Control (DTSC) and the Regional Water Quality Control Boards (RWQCB) for review based on analytical results and sensitive receptors in the proximity of the disposal site.

Staff recommends that a cover be placed on the site to meet state minimum standards and to prevent exposure to the public, and the environment....

19. On July 8, 2004, EMD staff met with representatives of DTSC, the RWQCB, and CIWMB, in accordance with the Burn Dump Protocol. The agencies applied the Process for Identification of Lead Remediation Oversight Agency and determined that EMD, as the LEA, would have lead responsibility for regulating the Waring's Dump site in its current condition. In making this designation, DTSC and the RWQCB determined that water quality and hazardous waste issues did not warrant either agency taking lead responsibility over the Waring's Dump site remediation.

20. By letter dated August 19, 2004, EMD notified appellant of the results of the SIR investigation. The letter stated that EMD "has lead responsibility for regulating the site in its current condition and has the authority to require that the site be closed in accordance with applicable California Code of Regulations, Title 27 requirements." EMD informed appellant that, "[d]ue to the presence of hazardous levels of lead and zinc identified in soils, and the close proximity of numerous residential properties," LEA staff require closure of the site in

accordance with Title 27 of the California Code of Regulations (27 CCR). The letter further stated,

Submittal of a closure plan will be required. This plan will be reviewed by the LEA, Regional Water Quality Control Board, California Integrated Waste Management Board, and possibly Department of Toxic Substance Control....Please note, in accordance with 27 CCR 21100(d): closed sites for which closure plans were not approved pursuant to 27 CCR 20164 or 21099...shall implement the provisions of these regulations as required by the LEA.

The letter acknowledged that "the landfill boundary encompasses multiple parcels, owned by multiple property owners." The owners were encouraged to submit a joint closure plan for the landfill as a whole. Under **Requirements for Future Site Development**, the letter stated:

Any plans to develop the site will require compliance with 27 CCR 21190 regarding post-closure land use. Any proposed use of the land will require notification of the LEA. Any plans shall be submitted to the LEA, RWQCB and DTSC for evaluation.

Additionally, any proposed sensitive use (human occupancy) of the site will require notification and site remediation clearance of the site by DTSC.

Appellant was given 30 days to contact EMD concerning a date for submission of the closure plan, and was instructed to contact Tammy Derby with any questions.

21. On September 1, 2004, Tammy Derby met with appellant and the other property owners concerning the standards to be applied for closure of the Waring's Dump site. The Lupsas were present, as was Marty Strauss on behalf of the City of Sacramento. Also in attendance were Robert Busby from RWQCB, Tim Patenaude from DTSC, and Dawn Owen and Alan Berg from CIWMB. AB2136 was explained to the owners, which would involve CIWMB developing a closure plan for the site, funding the remediation, and imposing a lien on the property to pay for costs of remediation. Ms. Derby engaged in ongoing discussions with appellant during the fall of 2004 concerning the need for a closure plan for Waring's Dump. According to Ms. Derby, appellant "was not amenable to the AB2136 program from the outset, because of the lien." Appellant made various oral proposals for closure of the site, including the use of concrete as a "cover." He was told to submit a written plan for review, but did not do so.

January 28, 2005 Notice and Order

22. On January 28, 2005, EMD issued a Notice and Order – Waring's Dump (Notice and Order), pursuant to PRC section 45000 and 14 CCR section 18304, to all owners of Waring's Dump. The Notice and Order states that, "in October and November 2004, City of Sacramento staff informed LEA staff that site security measures had been taken for their parcels, and stated that a plan to clean up the site by June 2005 was being prepared." The Notice and Order further stated that, after EMD issued the August 19, 2004 letter and met with the property owners on September 1, 2004 to discuss remediation requirements for the site, "LEA staff has not received any written response from the other property owners." The Notice and Order noted:

The site has not been secured against unauthorized access. The site has received numerous piles of dirt, rock and other landscape debris. Additionally, a large accumulation of junk and debris has collected on the site.

The LEA concluded that, "due to the presence of hazardous levels of lead and zinc identified in surface soils, the presence of exposed waste, inadequate cover, absence of site security and the close proximity of numerous residential properties, LEA staff has determined that the site must be closed in accordance with applicable Title 27 requirements."

23. Under **SPECIFIC ACTION REQUIRED**, The Notice and Order required the property owners to take action to remedy violations, as noted below:

A. 27 CCR section 20530 (Inadequate Site Security) – All points of access must be restricted to authorized persons only. Site security plan must be submitted to LEA for approval. Compliance Date: IMMEDIATELY.

B. 27 CCR section 20650 (Inadequate Grading of Fill Surfaces) – (1) Submit Closure Plan (see requirements listed below). Compliance Date: March 30, 2005; (2) Implement Closure Plan. Compliance Date: Within 30 days of LEA approval.

C. 27 CCR section 20750 (Inadequate Site Maintenance) – Remove all junk and debris. Compliance Date: February 28, 2005.

D. 27 CCR section 21100, subdivision (d) (Failure to Implement Closure Activities Required by LEA) – (1) Provide Closure Plan. Compliance Date: March 30, 2005; (2) Implement Closure Plan. Compliance Date: Within 30 days of LEA approval. Closure plan requirements are as follows:

- 27 CCR section 21135 – Site security must be in place so that all points of access to the site are restricted.
- 27 CCR section 21137 – Structures must be removed.

- 27 CCR section 21140 – Final cover shall be designed to function with minimum maintenance and provide waste containment to protect public health and safety.
- 27 CCR section 21142 – Final grades must be designed and maintained to reduce impacts to health and safety and take into consideration post closure land use.
- 27 CCR section 21145 – Integrity of final slopes must be maintained.
- 27 CCR section 21150 – A final drainage and erosion system shall be designed and maintained to ensure integrity of post closure land uses; to prevent public contact with waste and leachate; to prevent safety hazards; and to prevent exposure of waste.
- 27 CCR section 21170 – The owner shall file a detailed description of the closed site, including a map, with the Recorder of the County in which the site is located.
- 27 CCR sections 20920/20921 – To provide for the protection of public health and safety and the environment, the operator shall ensure that landfill gases generated are controlled.
- Record Deed Restriction – File appropriate documents to provide for restricted use of the landfill property.

24. Under **Penalties**, the Notice and Order states:

The owner and operator are notified that failure to comply with the Specific Actions and Terms and Conditions of this Notice and Order will result in one or more of the following penalties:

- Civil penalties may be sought of up to \$10,000 per day per violation for statutory violations pursuant to Division 30 PRC, Section 45023 and \$5,000 per day per violation in administrative civil penalties pursuant to Division 30 PRC, section 45011;
- The LEA may petition the Sacramento County Superior Court to enjoin the violations and impose other appropriate injunctive relief.
- Continued violation after obtaining injunctive relief may be punishable as Contempt of Court.

25. The Notice and Order included requirements for future site development that mandated compliance with 27 CCR section 21190 regarding post-closure land use, as well as submission of plans to the LEA, RWQCB and DTSC for evaluation. Additionally, any proposed sensitive use (human occupancy) of the site will require notification and site remediation clearance of the site by DTSC. The Notice and Order concluded with the following Note:

In accordance with PRC 45000(c), the LEA or the California Integrated Waste Management Board (CIWMB) may contract for corrective action after an order issued pursuant to PRC 45000(a) becomes final and the owner fails to comply.

Failure to remedy the aforementioned violation(s) by the required date(s) may result in the CIWMB expending available funds to perform any cleanup, abatement, or remedial work needed to protect public health and safety or the environment pursuant to PRC section 48020.

If the CIWMB expends funds to perform any cleanup, abatement, or remedial work, the CIWMB may seek repayment from responsible parties pursuant to PRC 48020 et seq. Moreover, funds so expended by the CIWMB constitute a lien upon the real property owned by any responsible party that is subject to the remedial action, pursuant to PRC section 48023.5.

26. Attached to the Notice and Order was a NOTICE OF RIGHT TO APPEAL (Appeal Notice), notifying the owners of their appeal rights pursuant to PRC sections 44307, 44308, and 44310. The Appeal Notice stated, in bold type:

If you choose to appeal this action, you must file a request for hearing no later than 15 days after receipt of the Notice and Order at the following address: Sacramento County LEA, Environmental Management Department, 8475 Jackson Road, Ste 240, Sacramento, CA 95826.

If you fail to request a hearing within the required time, the Notice and Order will become final and enforceable.

Events Following Issuance of the Notice and Order

27. Neither appellant nor the Lupsas filed a request for hearing or otherwise appealed the Notice and Order. The City of Sacramento filed a Notice of Appeal, Request for Hearing, and Statement of Issues with the EMD on February 15, 2005. On February 17, 2005, EMD staff met with City of Sacramento representative Marty Strauss and CIWMB staff member Dawn Owen. The parties determined that the SIR prepared by CIWMB in March 2004 did not examine waste within the boundaries of city-owned property. As of mid-February 2005, the City of Sacramento was in the process of contracting for an additional site investigation to determine the extent of waste buried on city-owned property. The City of Sacramento had secured its property against unauthorized access. The City of Sacramento intended to submit a cleanup/remediation plan after conclusion of its site investigation. Based upon the information obtained at the meeting, EMD rescinded the Notice and Order as to the City of Sacramento, and the City of Sacramento withdrew its Notice of Appeal and Request for

Hearing. These withdrawals were memorialized in a letter from EMD to the City of Sacramento, dated February 23, 2005.¹²

Site Security/Site Maintenance

28. The Notice and Order became final against appellant on February 14, 2005. As of that date, appellant was required to submit a site security plan to EMD and to secure the property against unauthorized access (Finding 23.A). As of February 28, 2005, appellant was required to remove all junk and debris from the property (Finding 23.C).

29. Tammy Derby inspected Waring's Dump on June 1, 2005, and prepared a Closed Disposal Site Inspection Report. Ms. Derby noted that site security was inadequate, in that there was easy access to the property along the west, south, and east sides, in continuing violation of 27 CCR section 20530. She also noted that site maintenance was inadequate, in that dumping of rubbish was occurring on the site, along with an accumulation of construction material and overgrown weeds, in continuing violation of 17 CCR section 20750.

30. Lisa Todd, Supervising Environmental Specialist with EMD, conducted an inspection of Waring's Dump on September 23, 2005, and prepared a Closed Disposal Site Inspection Report. Appellant was present for the inspection. The report noted that the site was not secured, and that adequate fencing must be provided to prevent public access; Ms. Todd also noted evidence of construction materials and rubbish dumped on the site, as well as overgrown vegetation. These matters constituted continuing violations of 27 CCR sections 20530 and 20750.

31. On March 10, 2006, Ms. Todd conducted a joint inspection of Waring's Dump with the City of Sacramento Code Enforcement Manager Ron O'Connor. Appellant was present for the inspection. As stated in her Closed Disposal Site Inspection Report, dated March 10, 2006, "[t]he purpose of the inspection and site meeting with the owner, Mr. Singh, was to discuss the ongoing lack of site security and continuous illegal dumping on the site." The report noted continuing violations of 27 CCR sections 20530 and 20750, and stated that "the site must be fenced, and cleaned up immediately." Regarding site security, appellant was ordered to "[p]rovide fencing and a secure lock to gated entry to prevent public access by March 31, 2006." Regarding site maintenance, the report stated, "Cleanup of the site is in progress. Remove all remaining wood, concrete, construction materials and junk and debris on the ground surface by March 31, 2006." The report concluded, "Failure to abate the violations noted today by compliance timeline give may result in additional enforcement actions."

32. On April 10, 2006, Ms. Todd conducted a follow-up inspection of Waring's Dump to determine whether the site had been secured and whether construction and demolition

¹² According to the testimony of William Busath, Supervising Engineer, City of Sacramento, Kleinfelder & Associates conducted a site investigation on behalf of the City of Sacramento in November of 2006, and evidence of waste was found at three locations on City-owned property at the Waring's Dump site. Mr. Busath confirmed the City of Sacramento's intention to share in remediation costs that affect City-owned property.

debris and inert debris had been removed from parcels 038-0202-001 and 038-0182-005, belonging to appellant. Ms. Todd noted that some posts had been installed along part of one of the parcels, but no fencing had been installed, and the wooden fence at the entry had been removed; the site remained unsecured. With regard to site maintenance, the wood, concrete, construction materials and junk and debris had not yet been removed. Continuing violations of 27 CCR sections 20530 and 20750 were noted.

33. Ms. Todd conducted a site inspection of Waring's Dump on June 19, 2006, and prepared a Closed Disposal Site Inspection Report. Ms. Todd noted that the site remained unsecured. There was no fencing along the south side of the site, along appellant's property, and fencing on the west side had been torn down, leaving the site open for possible illegal dumping, arson, and vandalism. She further noted that wood, concrete and construction materials that were to have been removed from the site were still there, and weeds were now one to four feet in height. Approximately half of the site showed evidence of having been burned. Appellant was cited for continuing violations of 27 CCR sections 20530 and 20750. Appellant was ordered to maintain vegetation at less than 12 inches in height to reduce the risk of fire, as specified by the local fire authority.

34. Ms. Todd conducted a focused inspection of Waring's Dump on February 7, 2007. She noted continuing violations of 27 CCR sections 20530 and 20750. She observed that "the site remains unsecured - no fence along Krishna Trust parcels to prevent site entry." She also noted that the site was not being maintained:

Large piles of mixed solid waste and construction debris on site from illegal dumping. Tall grasses have grown up around the three backhoes that are still on site.

Closure Plan

35. Pursuant to the Notice and Order, the Waring's Dump property owners were required to submit a closure plan to EMD by March 30, 2005. Appellant did not submit a closure plan by the deadline, and no joint closure plan was submitted by some or all of the property owners.

36. Prior to the March 30, 2005 deadline for closure plan submission, Tammy Derby sent an email to Wes Mindermann at CIWMB, and others, concerning the possibility of remediating the Waring's Dump site under the AB2136 program. In her March 14, 2005 email, Ms. Derby stated:

Hello All, the Waring's Dump Notice and Orders were not appealed. They are final now. Is it possible to request that the CIWMB provide remediation to the site under the 2136 program? The owners are financially unable to comply. Both sets of property owners purchased the property with the understanding that the fill was inert fill, for the most part. Until the LEA

requested the CIWMB study, no one knew of the high metals concentration. If this remediation can be funded by the 2136 monies, CIWMB Board Managed, with a lien placed on the properties, then I would like you to join with me and the owners and explain the process....

37. At the same time that EMD was considering the possibility of AB2136 funding, CIWMB was exploring the option of obtaining a matching grant for the City of Sacramento. In a March 17, 2005 email responding to Ms. Derby, Scott Walker from CIWMB wrote:

Wes is looking into this and will get back to you. Marty Strauss from the City has inquired regarding Matching Grants for the City to cleanup Warings Dump. We anticipate that a MG option would be preferable, because City appears to also be a PRP.¹³

38. On June 28, 2005, Ms. Derby met with appellant, the Lupsas, and CIWMB staff to discuss the status of the Waring's Dump closure plan. At that meeting, appellant stated his opinion that remediation was not "time sensitive," and it was "not critical to move forward." Appellant expressed his opposition to allowing CIWMB access to his property for remediation activities, and stated his intention to submit a closure plan. The Lupsas were willing to grant CIWMB access to their property and were willing to comply with the Notice and Order. CIWMB staff offered to conduct a "scoping investigation" with CIWMB funds, at no cost to the owners. Appellant "agreed to any access that will not result in a lien against the property."

39. On September 7, 2005, Ms. Derby sent the following email to Wes Mindermann at CIWMB:

Wes, some time ago we met with the property owners to discuss the idea of CIWMB staff providing remediation to the CIA site at the LEA request and filing a lien against the property for the cost of the project. The LEA has issued N&Os and they are final and enforceable and include the information that the LEA and/or CIWMB will recover costs associated with enforcement actions. The property owners were agreeable to allow some further investigation into the costs of remediation. You offered that you and your staff could do that at LEA request at no cost to the property owners. By this email, I am asking that [sic] your assistance in determining the feasibility and cost of providing a cap and grade to this CIA site thru a AB2136 Project. Please let me know if you can assist. Thank you.

40. On September 22, 2005, Lisa Todd met with appellant, the Lupsas, and CIWMB staff. They discussed the process for CIWMB to conduct a field survey and site investigation to

¹³ Potential responsible party.

determine the scope of remediation work, as well as the fact that liens on parcels would correspond with the percentage of work performed on said parcels. The owners were informed that signed access agreements would be needed before work could commence.

41. During Ms. Todd's September 23, 2005 inspection of Waring's Dump (Finding 30), CIWMB conducted a preliminary site evaluation in preparation for the proposed scoping investigation.

42. On October 13, 2005, appellant signed a Property Access Authorization for Investigation of Disposal Site, allowing CIWMB staff and/or designated contractor to conduct an intrusive investigation of the disposal site, under authority of PRC sections 44100 and 45013, and 14 CCR sections 18083 and 18094, which require the LEA to investigate, inspect and enforce state minimum standards at CIA disposal sites. The CIWMB field survey and site investigation of Waring's Dump commenced in December of 2005.

43. On March 10, 2006, during her inspection of Waring's Dump, Ms. Todd noted that "three (3) backhoes were observed on site and covering of inert waste and site grading has been occurring without benefit of an approved closure plan as required." Appellant was ordered to cease all grading activity on site immediately, and remove the three backhoes from the site by Monday, March 13, 2006. Ms. Todd's inspection report further stated:

At the request of the LEA, and with the cooperations [sic] of the site owners, the California Integrated Waste Management Board is designing a closure plan for the site which will meet the requirements of Title 27 CCR. Upon completion of the closure plan, the CIWMB and the LEA will meet with all the owners to discuss the final closure plan for the site.

44. On March 13, 2006, Ms. Todd conducted a focused inspection of Waring's Dump to determine whether or not appellant had removed the three backhoes from parcel number 038-0202-001. Appellant had been informed that no grading was to occur on the site until a closure plan that complies with Title 27 CCR was submitted to and approved by the LEA.

45. On March 17, 2006, the EMD received a one-page, undated, unsigned "closure plan" for Krishna Living Trust, with a parcel map attached (March closure plan). The March closure plan proposed grading all affected parcels with the slope of 1:100 or more toward Morrison Creek and 63rd Street, to direct the flow of surface water to Morrison Creek; "[t]hen, a concrete/asphalt cover of thickness 2" or more may be provided for additional safe drainage of surface water to the Morrison Creek and the 63rd Street. On March 24, 2006, EMD staff met with appellant and explained that his proposed closure plan was inadequate to remediate the site and did not satisfy the requirements of Title 27 as set forth in the Notice and Order.

46. On March 20, 2006, Ms. Todd conducted another focused inspection of Waring's Dump to determine whether or not appellant had removed the three backhoes from parcel number 038-0202-001. The backhoes were still on the site as of that date.

47. During Ms. Todd's April 10, 2006 inspection of Waring's Dump, she noted that "the three backhoes were still parked on the site, with some evidence that inert material was being used to fill depressions observed [sic]." Appellant was cited for a continuing violation of 27 CCR section 20650, in that he was engaged in grading activities at the site without an approved closure plan in place.

48. On May 19, 2006, CIWMB entered into an agreement with SCS Engineers to provide a cover design for Waring's Dump, and a detailed cost estimate for the cover construction and implementation. SCS Engineers submitted a preliminary cost estimate and proposal for cover to CIWMB on June 21, 2006. A final draft was submitted for review by CIWMB on July 24, 2006, and two sets of plans and construction cost estimates were delivered by SCS Engineers to CIWMB on August 7, 2006. The cost to design, construct, and implement the cover project for the Waring's Dump was estimated to be \$239,560.¹⁴ According to the testimony of Wes Mindermann, the plans and cost estimate were not shown to appellant until May of 2007, as part of the document disclosure to appellant in preparation for the appeal hearing in this matter. The testimony of Mr. Mindermann, a Senior Waste Management Engineer for CIWMB, further established that the closure plan prepared by SCS Engineers would bring the Waring's Dump site into compliance with minimum standards under Title 27.

49. On May 30, 2006, appellant submitted a Closure Plan Report for Waring's Dump Closure to EMD, which appellant certified as a civil engineer on June 30, 2006 (May closure plan). The May closure plan reiterated the proposal in the March closure plan to grade the site and possibly install a concrete or asphalt cover. The May closure plan contained the false representation that "the site has the fences and thus, all points of access to the site are restricted." The May closure plan also includes the assertions that "there is no need to provide any closure," and "the site does not require any further improvement."

50. During Ms. Todd's June 19, 2006 inspection of Waring's Dump, she cited appellant for a continuing violation of 27 CCR section 20650, in that the three backhoes were still on site, surrounded with tall grass, despite orders to remove them and to desist from grading activities on the site without an approved closure plan. Ms. Todd's inspection report references appellant's May closure plan, noting that it "does not address all Closure Plan Requirements outlined in the Notice and Order." Ms. Todd's inspection report further stated:

At the request of the LEA, and with the cooperation of the site owners, consultants for the CA Integrated Waste Management Board have been drafting a closure/final grading plan for the site which will meet the requirements of 27 CCR and the City of Sacramento's drainage requirements. This plan is under final

¹⁴ The estimate includes \$12,000 to remove and replace the fence around the entire property.

revision. Upon completion of the closure plan, the CIWMB and LEA will meet with all site owners.

51. By letter dated July 27, 2006, Ms. Todd advised appellant that EMD staff, with the assistance of CIWMB Solid Waste Cleanup Programs staff, had reviewed appellant's May closure plan and identified various deficiencies; including (1) lack of detail regarding construction of the cover and the grading plans; (2) proposed structures on site, which have not been submitted for approval as required for postclosure site uses; and (3) lack of site security. EMD recommended that appellant "submit a grading plan with details and specifications that is [sic] consistent with the requirements for a City grading permit."¹⁵ The letter detailed eight typical requirements for site/civil plans for rough grading, with the further recommendation that appellant contact the City of Sacramento Engineering Department for additional requirements.

52. Appellant submitted an undated written response to EMD in reply to Ms. Todd's July 27, 2006 letter. He indicated he "would take care of all deficiencies without any addition to my closure plan." He further stated:

1. I am applying the permit for grading from the City of Sacramento. The City of Sacramento allows some grading without permit. I will do that without permit. Mr. Mustafe Botan also suggested that I should grade the ground as soon as possible. In the process of obtaining the permit, the City of Sacramento will receive all the required information.
2. All the postclosure site uses will be submitted to LEA and other agencies.
3. I discussed the site security on page 2 of my report. I am still negotiating with the City of Sacramento for more security. I will address this issue after a reasonable solution is provided to us by the City of Sacramento.

53. On September 27, 2006, EMD sent a letter to appellant addressing the points made in his reply to EMD's July 27, 2006 letter. In the September 27, 2006 letter, EMD noted that (1) appellant's plan to obtain a grading permit from the City of Sacramento "does not constitute approval by the LEA for you to begin any grading or other remediation activities on site;" (2) any plan to develop the site must comply with 27 CCR section 21190 regarding post closure land use, as stated in the January 28, 2005 Notice and Order; and (3) with regard to appellant's statement that he is "negotiating" with the City of Sacramento to secure the site, "As property owner you are responsible for securing the site under 27 CCR sec. 20530. Your

¹⁵ At no time did EMD expect appellant to obtain a grading permit from the City of Sacramento as a requirement for submitting a satisfactory closure plan.

continued failure to secure the site presents a public health and safety hazard, is an invitation to illegal dumping, and is subject to administrative penalties." The letter concluded:

As you are aware, the CIWMB, at the request of the LEA, and pursuant to Public Resources Code Sections 48020 and 48023.5, has been working on a remediation plan to bring the site into full compliance with 27 CCR. You will soon be receiving a Penalty Order, including attachments that will describe the remediation plan and advise you of your options at this time.

54. On September 27, 2006, Ms. Todd sent an email to Steve Levine at CIWMB, which stated:

I wanted to check with you to see how far along you are on the access agreement and lien authorization that we asked you to insert in our enforcement order. Every day that goes by we run the risk of Mr. Singh commencing unauthorized grading activities on his own. The other owner, Ester Lupsa, has been calling regularly since December, the original date that the CIWMB gave the owner's [sic] for completing the site survey, remediation plan and cost estimate. Although the delays due to engineering contract changes and other thing [sic] were unforeseeable they have lead [sic] to a number of complications at the site, including Mr. Singh beginning to submit his own eleventh hour "closure plans." We really need to get the Penalty Order and all attachments out quickly.

55. As of November 2, 2006, CIWMB had still not provided EMD with the requested documents. On that date, Dennis Green, Chief of the EMD Hazardous Materials Division, wrote a letter to Wes Mindermann at CIWMB that stated:

As you are aware, we have been trying to develop and issue enforcement documents to the responsible parties relating to the Sacramento County property known as Waring's Dump. We met with you and members of the CIWMB staff on July 27th of this year to work out a joint Sacramento County Environmental Management Department (EMD)/CIWMB effort to achieve progress towards bringing this property into compliance. Subsequent to that meeting, we developed draft documents and, as we had agreed, submitted them to CIWMB on August 16th for review and edit. At that time we were promised a prompt turnaround from your staff.

To date, we have yet to receive your input and have been unable to move forward on the Waring's Dump compliance effort. This

lack of progress has been experienced despite numerous inquiries from EMD to CIWMB staff relating to the status of the enforcement document review. I am asking for your assistance in getting this effort moved to completion. Please let me know if I need to provide any additional information.

56. Notwithstanding the urgency of Mr. Green's letter, it was not until February 9, 2007 that EMD issued a Notice of Penalty Assessment to appellant and the Lupsas.

57. During Ms. Todd's February 7, 2007 focused inspection of Waring's Dump, she cited appellant for a continuing violation of 27 CCR section 20650, in that the three backhoes were still on site, overgrown with weeds. She further noted that "[s]eparate piles of mounded soil mixed with solid waste are observed on the southeastern portion of the site," indicating possible unauthorized grading without an approved closure plan in place.

Notice of Penalty Assessment

58. On February 9, 2007, EMD issued a separate Notice of Penalty Assessment (NOPA) to appellant and to the Lupsas. The NOPA issued to appellant stated that appellant had been issued the January 28, 2005 Notice and Order, citing four violations of Title 27 regulations; that he failed to appeal the Notice and Order; that pursuant to a Penalty Order attached to the NOPA, he had not complied with the January 28, 2005 Notice and Order; thereby resulting in continuing violations justifying the imposition of an administrative penalty on appellant in the amount of \$404,000.¹⁶ The NOPA invited appellant to request the LEA to schedule a settlement conference pursuant to PRC section 45011, subdivision (b)(2).

The NOPA stated that the Penalty Order would become effective in 15 business days of the receipt, unless appellant (1) agreed to a settlement offer; or (2) requested an appeal by filing a Statement of Issues along with a Notice of Defense.

The settlement offered by EMD would have required appellant to sign a Stipulated Penalty Order attached to the NOPA; immediately sign the Property Access Authorization for Abatement Action for the California Integrated Waste Management Board to begin abatement of the site in accordance with 27 CCR; and perform required compliance activities by deadlines listed in the Stipulated Penalty Order. The Stipulated Penalty Order specified that CIWMB was entitled to seek repayment of funds expended in undertaking the abatement action, and that funds so expended by the CIWMB constitute a lien upon the real property subject to the remediation action pursuant to PRC section 42847.5 and/or 48023.5.

The NOPA further stated that, if appellant filed an appeal, the Settlement Offer was rescinded, and EMD would seek the full administrative civil penalty of \$404,000.

¹⁶ The administrative penalty sought to be imposed on the Lupsas was in excess of \$300,000.

59. On February 20, 2007, appellant filed the Notice of Defense with EMD, requesting a hearing to contest the Penalty Order. Appellant also filed a document entitled "Reasons for Having No Enforcement Action for Waring's Dump," which EMD deemed to be a Statement of Issues filed pursuant to PRC section 44310, subdivision (a)(1).

60. EMD held separate settlement meetings on February 22, 2007, with appellant and with the Lupsas, to discuss the options set forth in the NOPA. The Lupsas signed the Stipulated Penalty Order and Site Access Agreement on February 22, 2007, agreeing to permit CIWMB to remediate their parcels and place liens on the property for the pro-rated cost of remediation. Appellant chose to pursue his appeal, and orally informed EMD that he was waiving the mandatory timeline for hearing in the PRC; however, he failed to submit a written waiver in time to re-schedule a hearing. Therefore, on March 2, 2007, EMD rescinded the February 7, 2007 Penalty Order, without prejudice.

61. On March 7, 2007, EMD re-issued the NOPA and Penalty Order. By letter dated March 19, 2007, appellant waived the 30-day timeline to schedule an appeal hearing, and incorporated by reference his Statement of Issues previously filed with EMD.

62. On April 13, 2007, appellant submitted a grading plan to EMD. In a letter from Dennis Green to appellant, dated May 11, 2007, Mr. Green explained that appellant's grading plan was found to be inadequate because (a) it proposed a .2 percent grade, when active landfills are required to have a minimum three percent grade, and the recommended minimum grade on older sites was two percent, or a minimum of one percent in extreme cases where no other alternatives are feasible; (b) based on the plan submitted, more cut and fill appeared to be required than was reflected on the plan; (c) no details were provided regarding the proposed drainage system or erosion control measures.

Penalty Assessment

63. PRC section 45016 lists the matters to be considered prior to making a determination regarding the amount of any liability that may be imposed pursuant to an order issued under PRC section 45000 et seq., and which include the following:

- (a) The nature, circumstances, extent, and gravity of any violation or any condition giving rise to the violation and the various remedies and penalties that are appropriate in the given circumstances, with primary emphasis on protecting the public health and safety and the environment.
- (b) Whether the violations or conditions giving rise to the violation have been corrected in a timely fashion or reasonable progress is being made.
- (c) Whether the violations or conditions giving rise to the violation demonstrate a chronic pattern of noncompliance with

this division, the regulations adopted pursuant to this division, or with the terms and conditions of a solid waste facilities permit, or pose, or have posed, a serious risk to the public health and safety or to the environment.

(d) Whether the violations or conditions giving rise to the violation were intentional.

(e) Whether the violations or conditions giving rise to the violation were voluntarily and promptly reported to appropriate authorities prior to the commencement of an investigation by the enforcement agency.

(f) Whether the violations or conditions giving rise to the violation were due to circumstances beyond the reasonable control of the violator or were otherwise unavoidable under the circumstances.

(g) Whether in the case of violations of this division, or the regulations adopted pursuant to this division, the violator has established...programs prior to committing the violation that will help to prevent violations of the type committed in the future [list of programs omitted].

64. Dennis Green applied the criteria set forth in PRC section 45016 in assessing the civil penalties set forth in the NOPA. Mr. Green considered the purpose of imposing monetary penalties, which included achieving compliance; protecting the environment; protecting public health and safety; deterring future misconduct; and eliminating unfair business advantage gained from noncompliance. With regard to appellant, Mr. Green viewed each of the four Title 27 violations as continuing, and calculated the penalty from February 12, 2005 (the date the Notice and Order became final) to December 31, 2006, a period of 687 days.¹⁷ Whereas PRC section 45011 allows for a civil penalty of up to \$5,000 per day per violation, Mr. Green imposed penalties that were between two and three percent of the maximum (between \$100 and \$150 per day). In selecting a "base amount" for each violation, Mr. Green considered PRC section 45011, subdivision (a), the nature, circumstances, extent and gravity of the violation; he then applied the other factors as matters in aggravation or mitigation of the base amount, as follows:

A. 27 CCR section 20530 (Inadequate Site Security): Mr. Green used a base civil penalty of \$125 per day; he found that there was a chronic pattern of noncompliance or serious risk to public health, safety or the environment (PRC section

¹⁷ Although the EMD chose to use a cutoff date of December 31, 2006 to calculate the civil penalties, the evidence established that conditions remained unremediated as of Ms. Todd's February 7, 2007 inspection (Findings 34 and 57).

45016, subdivision (c)), and that appellant's violation was intentional (PRC section 45016, subdivision (d)), as factors in aggravation, with a 10 percent multiplier for each factor (20 percent total). He found no factors in mitigation. He calculated the civil penalty as follows: $\$125 \text{ per day} \times 687 \text{ days} = \$85,875$. $\$85,875 + (\$85,875 \times .20) = \$103,050$.

B. 27 CCR section 20650 (Inadequate Grading of Fill Surfaces): Mr. Green used a base civil penalty of \$150 per day; he found that there was a chronic pattern of noncompliance or serious risk to public health, safety or the environment (PRC section 45016, subdivision (c)), and that appellant's violation was intentional (PRC section 45016, subdivision (d)), as factors in aggravation, with a 10 percent multiplier for each factor (20 percent total). He found no factors in mitigation. He calculated the civil penalty as follows: $\$150 \text{ per day} \times 687 \text{ days} = \$103,050$. $\$103,050 + (\$103,050 \times .20) = \$123,660$.

C. 27 CCR section 20750 (Inadequate Site Maintenance): Mr. Green used a base civil penalty of \$100 per day; he found that there was a chronic pattern of noncompliance or serious risk to public health, safety or the environment (PRC section 45016, subdivision (c)), as a factor in aggravation, with a 10 percent multiplier (10 percent total). He found no factors in mitigation. He calculated the civil penalty as follows: $\$100 \text{ per day} \times 687 \text{ days} = \$68,700$. $\$68,700 + (\$68,700 \times .10) = \$75,570$.

D. 27 CCR section 21100, subdivision (d) (Failure to Implement Closure Activities): Mr. Green used a base civil penalty of \$135 per day; he found that there was a chronic pattern of noncompliance or serious risk to public health, safety or the environment (PRC section 45016, subdivision (c)), as a factor in aggravation, with a 10 percent multiplier (10 percent total). He found no factors in mitigation. He calculated the civil penalty as follows: $\$135 \text{ per day} \times 687 \text{ days} = \$92,745$. $\$92,745 + (\$92,745 \times .10) = \$102,019$.

Appellant's Credibility

65. Appellant was an uncooperative and evasive witness at hearing. When asked to state his name, he said, "[i]n this proceeding, I'm appearing as Raghvendra Singh." Appellant "could not remember" the first name which appears on his passport. He gave a birthdate, but could not state his age with certainty. When asked about his education and training, appellant stated he attended Roor Engineering College in India for four years, but claimed not to remember the name of the town where the college was located, and could not state the exact year he graduated. This testimony was wholly lacking in credibility.

66. Appellant was evasive and essentially refused to answer questions about where he lived, who owned the property where he resided, and who else resided at the property. Likewise, appellant was for the most part non-responsive regarding questions about the Krishna Living Trust; he could not say if he was the trustee, or the trustor, or how the trust was set up, or who the beneficiaries were. And appellant was totally evasive concerning the sale of the

property from Houston Tuel and Robert Newton to the Krishna Living Trust. Counsel for EMD was essentially deprived of the opportunity to cross-examine appellant on these issues, which were relevant to appellant's claim that he was a bona fide purchaser or an innocent landowner, or that he had made "all appropriate inquiries," pursuant to Health and Safety Code section 25323.5 and title 42 United States Code sections 9601(35) and 9607(b). Consequently, the Administrative Law Judge ruled that appellant's arguments concerning these issues would be disregarded. Likewise, appellant was precluded from arguing his personal inability to pay civil penalties, due to his refusal to answer questions about his financial situation.

LEGAL CONCLUSIONS

Appellant's arguments re EMD's lack of jurisdiction are all without merit.

1. Appellant asserts that the EMD lacks jurisdiction over the Waring's Dump because, under the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health & Saf. Code, §§ 25300-25395.40) (HSAA), DTSC and/or the Water Board have exclusive jurisdiction over all remedial response actions. Appellant cites *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337 (*Lodi*) in support of his position. In *Lodi*, the City of Lodi established its own environmental enforcement and investigative mechanism (MERLO), and issued an administrative enforcement order against Randtron which required abatement actions. The court found that, once a site becomes listed pursuant to Health and Safety Code section 25356 as a hazardous substance release site, all actions carried out in response to hazardous substance releases or threatened releases shall comply with the procedures, standards, and other requirements set forth in HSAA. (*Id.* at 353) DTSC was charged with sole responsibility for ensuring that the required action in response to a release or threatened release at a listed site is carried out in compliance with those procedures. (*Id.* at 353) The site in question was a listed site under Health and Safety Code section 25356.

Appellant's argument is not persuasive. The present matter involves an entirely different environmental condition and a different statutory scheme. EMD, as the LEA, has an express grant of authority from the legislature, in PRC section 48022, subdivision (h), which states:

Burn dump sites are presumed to be solid waste disposal sites, subject to the general authority and responsibility of the board [CIWMB] and the local enforcement agencies. In addition to this general presumption, it is the intent of the Legislature to require that the procedures set forth in Section 48022.5 be followed to ensure that hazardous substances and hazardous wastes at burn dump sites are adequately characterized and safely managed and remediated in consultation with, or under the direct oversight of, the department or the appropriate regional water quality control board, or both.

There is no evidence that Waring's Dump was on the list of hazardous substance release sites pursuant to Health and Safety Code section 25356. On the other hand, Waring's Dump was listed on CIWMB's SWIS as a solid waste disposal site (Finding 10). Appellant's claim that HSAA provides the exclusive remedy, and that DTSC is the agency with exclusive authority over Waring's Dump, is without merit.¹⁸

2. Appellant asserts that the EMD lacks jurisdiction over the Waring's Dump because of the applicability of the California Land Reuse and Revitalization Act of 2004 (Health & Saf. Code, § 25395.60 et seq.) (CLRRA) which, inter alia, established a voluntary process for bona fide purchasers, innocent landowners, and contiguous property owners to make certain the extent of their liability, if any, under state law for hazardous materials contamination caused by other persons, without otherwise altering existing state law regarding liability for hazardous materials releases. (Health & Saf. Code, § 25395.61) CLRRA is inapplicable to the instant proceeding, in that appellant has taken none of the actions that would be required to invoke the process set forth in CLRRA; he has not applied to either the DTSC or Water Board; has not entered into an agreement for a site assessment; and has not prepared and implemented a plan to remediate the property; and has not received approval from DTSC or the Water Board. (Health & Saf. Code, § 25395.92) Furthermore, appellant has been precluded from claiming that he is a bona fide purchaser or innocent landowner for purposes of CLRRA by reason of his refusal to answer questions at hearing (Finding 66).

3. Appellant claims that PRC sections 48020 – 48023.5 do not apply to Waring's Dump because it was not a burn dump site. "Burn dump site" is defined in PRC section 48022.5, subdivision (a)(1) as a solid waste disposal site¹⁹ which was operated prior to 1972; is closed; and, prior to closure, was a site where open burning was conducted. The evidence established that Waring's Dump operated with the acquiescence (although without a permit) of the City of Sacramento in the 1940s (thus prior to 1972), and that residents in the area complained about burning taking place at Waring's Dump (Finding 11). Testing performed at the site in 2004, as summarized in the SIR, revealed the presence of burned material (Finding 18). Thus, Waring's Dump meets the statutory definition of a burn dump site, and appellant's contention is without merit.

4. Appellant claims that DTSC and/or the Water Board have jurisdiction over Waring's Dump based on PRC section 48022, subdivision (h), which gives these agencies authority to exert "direct oversight" over the remediation of hazardous substances and

¹⁸ Appellant cited *U.S. v. W.R. Grace & Co.* (2005) 429 F.3d 1224 (*Grace*), for the purpose of explaining the term "remediation," and the requirements of involuntary remediation. However, *Grace* interpreted the federal Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.) (CERCLA), legislation which addressed the designation and remediation of so-called federal "Superfund" sites. This case is not applicable to the issues raised in the appeal herein.

¹⁹ PRC section 48022, subdivision (d), states: "A burn dump site is a solid waste disposal site and, as such, is a site that is eligible for funding pursuant to the program, provided all other criteria for program eligibility are met."

hazardous waste at burn dump sites. However, that same subsection makes clear that "the board and the local enforcement agencies" (i.e., CIWMB and EMD) have presumptive authority over burn dump sites. PRC section 48022.5, subdivision (b), required CIWMB, DTSC, and the Water Board to "develop protocols to be utilized by the board and the local enforcement agencies for site investigation and characterization of hazardous substances at burn dump sites." The Burn Dump Protocol was promulgated in response to this legislative directive, and as specified under the terms of said protocol, the affected agencies engaged in consultation and determined that EMD would be the lead agency for remediation action concerning Waring's Dump (Finding 19). Appellant's claim that EMD has improperly asserted its authority over appellant is not persuasive.²⁰

5. Appellant claims that EMD's authority over Waring's Dump is derived exclusively from PRC sections 48021 – 48023.5, and that the portions of the PRC requiring provision of a closure plan and allowing enforcement actions do not apply to Waring's Dump. This claim is not persuasive. Under PRC section 48022, subdivision (a), "Pursuant to the legal framework and definitions pertaining to solid waste contained in this division, the board and the local enforcement agencies have general authority and responsibility for responding to environmental conditions at solid waste disposal sites to ensure protection of the public health and safety and the environment." As previously noted in Legal Conclusion 1, PRC section 48022, subdivision (h), burn dump sites are presumed to be solid waste disposal sites, subject to the general authority and responsibility of the board and the local enforcement agencies. PRC section 48022.5, subdivision (j), states: "Nothing in this section is intended to limit the authority of the board, the department, the State Water Resources Control Board, or a regional board pursuant to other provisions of law."

PRC section 45000, subdivision (a) states: "Except as provided in subdivision (b),²¹ the enforcement agency may issue an administrative order requiring the owner or operator of a solid waste facility to take corrective action as necessary to abate a nuisance, or to protect human health and safety or the environment." (emphasis added) Thus, EMD, as the LEA, was authorized to issue the Notice and Order, requiring the owners of Waring's Dump, including appellant, to take corrective actions as set forth therein. Furthermore, EMD's authority to impose civil penalties is set forth in PRC section 45011, subdivision (a), which states:²²

²⁰ Appellant's assertion that, having declined to take lead responsibility, DTSC and/or the Water Board determined that no site remediation is necessary for Waring's Dump, is not supported by the evidence. The SIR clearly found that Waring's Dump did not meet minimum standards for closed disposal sites, and recommended remediation (Finding 18). Furthermore, PRC section 48022.5, subdivision (g), provides in part that, "[i]f, following a review of the site information, ... the department [DTSC] or a regional board [Water Board] does not request to provide remediation oversight, remediation oversight of the site shall remain with the board [CIWMB]."

²¹ PRC section 45000, subdivision (b), states: "An administrative order shall not be issued for any minor violation that is corrected immediately in the presence of the inspector. Immediate compliance in that manner shall be noted in the inspection report." In this case, the violations were neither minor nor corrected immediately in the presence of the inspector; hence, the exception set forth in PRC section 45000, subdivision (b) is inapplicable.

²² PRC section 45011, subdivision (b), states:

(a) If an enforcement agency determines that a solid waste facility or disposal site, is in violation of this division, any regulations adopted pursuant to this division, any corrective action or cease and desist order, or any other order issued under this division, or poses a potential or actual threat to public health and safety or the environment, the enforcement agency may issue an order establishing a time schedule according to which the facility or site shall be brought into compliance with this division. The order may also provide for a civil penalty, to be imposed administratively by the enforcement agency, in an amount not to exceed five thousand dollars (\$5,000) for each day on which a violation occurs, if compliance is not achieved in accordance with that time schedule.

6. Appellant contends that the hearing procedure set forth in PRC section 44310, under which this proceeding is being conducted, is only applicable to the suspension or revocation of permits, and is therefore invalid as applied against appellant. This contention is completely without merit. As set forth in Legal Conclusion 5, PRC section 45000, subdivision (a), establishes EMD's authority to take enforcement action against the owner of a solid waste facility, such as appellant. PRC section 45002 states: "An order issued pursuant to this part or Part 4 (commencing with Section 43000) shall provide the person subject to that order with a notice of that person's right to appeal pursuant to Part 4 (commencing with Section 43000) and Part 6 (commencing with Section 45030)." Thus, the appeal procedure, including the right to a hearing under PRC section 44310, is applicable to appellant.

7. Appellant claims that the Title 27 regulations that were the basis of EMD's Notice and Order are only applicable to operators of solid waste facilities, and cannot be applied against the owners of Waring's Dump, including appellant. This claim is without merit. 27 CCR section 20150 (CIWMB) states:

Unless the context requires another construction, the definitions

(b) Before issuing an order that imposes a civil penalty pursuant to subdivision (a), an enforcement agency shall do both of the following:

(1) Notify the operator of the solid waste facility that the facility is in violation of this division.

(2) Upon the request of the operator of the solid waste facility, meet with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date.

Based on the language of PRC section 45011, subdivision (b), appellant contends that PRC section 45011 only applies to operators of solid waste facilities, rather than owners. This contention is not persuasive; where, as in the case of Waring's Dump, there is no operator, the notification requirement would not apply. However, in the present case, EMD issued its Notice and Order two years before it issued the Penalty Order against appellant; in the interim, EMD staff met frequently with appellant to attempt to obtain his compliance with regulatory requirements.

set forth in this chapter and in Division 30 of the Public Resources Code shall govern the construction of this Subdivision. No definitions which are present in Division 30 of the Public Resources Code are repeated herein. Consequently, those definitions should be read in conjunction with the ones set forth herein.

27 CCR section 20164 states in part:

"Operator" (CIWMB) means the landowner or other person who through a lease, franchise agreement or other arrangement with the landowner becomes legally responsible to the State for including, but not limited to, the following requirements for a solid waste facility or disposal site:

- (A) obtaining a solid waste facility permit;
- (B) complying with all applicable federal, state and local requirements;
- (C) the physical operation of the facility or site; and
- (D) closing and maintaining the site during the postclosure maintenance period.

Appellant is a landowner who is legally responsible to the state for complying with all applicable federal, state, and local requirements, and for closing and maintaining the site during the postclosure maintenance period; thus, he falls within the definition of "operator" for purposes of Title 27 regulations.

Appellant also argued that Title 27 regulations were not applicable because (1) they cannot be applied "retroactively" to sites closed prior to November 27, 1984; (2) California Code of Regulations, title 22, should apply; (3) if AB2136 funding for remediation is not sought, no enforcement action is required; and (4) the LEA should be chosen by the "discharger," and appellant never "chose" EMD as the LEA. These arguments are rejected for the following reasons: (1) 27 CCR section 21100, subdivision (d), states: "Closed sites for which closure plans were not approved pursuant to §20164 or §21099, and illegal or abandoned disposal sites which pose a threat to public health and safety or the environment shall implement the provisions of these regulations as required by the EA;" thus the regulations specifically apply to older sites such as Waring's Dump, and are not being applied "retroactively." (2) Title 22 regulations apply to DTSC; since EMD, rather than DTSC is the appropriate enforcement agency (Legal Conclusions 1 and 2), Title 22 regulations are inapplicable. (3) In this case, the trigger for evaluation of the site under the Burn Dump Protocol was a proposal to develop the property, and once deficiencies were noted, enforcement action was authorized under the statutes and regulations (Findings 17-

18). (4) Under the Burn Dump Protocol and PRC sections 48022 and 48022.5, the LEA is the presumptive lead agency in burn dump remediation cases, unless either DTSC or the Water Board requests to be the lead agency. The protocol was followed in this case, and DTSC and the Water Board declined to take lead responsibility (Finding 19).²³

8. Appellant contends that the City of Sacramento has exclusive jurisdiction over illegal dumping and/or nuisance activities at Waring's Dump. Appellant is apparently relying on language in *City of Lodi v. Randtron, supra*, 118 Cal.App.4th 337, in which the court agreed that local municipalities retain authority to regulate hazardous waste remediation "in some circumstances." (*Id.*, at p. 352.) The court went on to state: "Under article XI, section 7 of the California Constitution, a municipality's police power to protect the health, safety and comfort of its inhabitants is plenary. As long as that power is exercised within the municipality's territorial limits and does not conflict with state law, it is coextensive with that of the Legislature [citation.]" (*Ibid.*) The *Lodi* case does not provide support for appellant's position. In this case, EMD has statutory authority to take regulatory enforcement action against Waring's Dump. The City of Sacramento may act so long as its actions do not conflict with EMD's statutory authority; EMD is certainly not precluded from enforcing provisions of the PRC or Title 27 regulations.²⁴ Nor is EMD precluded from taking remedial action by the fact that illegal dumping may have taken place at Waring's Dump. PRC section 48021, subdivision (c)(1), provides that CIWMB may abate illegal disposal sites, and subdivision (c)(3) requires the LEA to provide ongoing enforcement in such circumstances to prevent recurrence of illegal dumping.

Appellant's contentions/defenses concerning issuance of the Notice and Order were waived due to appellant's failure to appeal the Notice and Order

9. Appellant contends that the appeal filed by the City of Sacramento against the January 28, 2005 Notice and Order should be treated as an appeal by all of the owners of Waring's Dump. This contention is without merit. The basis for the City of Sacramento's appeal was that the SIR did not include testing on property owned by the City, and it was on that basis that the Notice and Order was rescinded against the City only (Finding 27). Clearly, the SIR was applicable to property owned by appellant and the Lupsas, and the

²³ AB2061, relied on by appellant in support of his position, is clearly inapplicable. The purpose of the Site Designation Process established by AB2061 on January 1, 1994 was to allow a Responsible Party (as defined) who agrees to carry out a site investigation and remedial action to request the Site Designation Committee within the California Environmental Protection Agency (Cal/EPA) to designate a single state or local agency to oversee the cleanup action. Appellant has not taken any of the actions that would trigger such a request, and the statutory scheme put in place through AB2136 clearly contemplated that CIWMB and the LEAs would be lead agencies in most burn dump site remediations.

²⁴ Appellant's citation of PRC section 43205, subdivision (c), in support of the City of Sacramento's exclusive jurisdiction over illegal dumping, is misplaced; subdivision (c) states that "[the board [CIWMB] and the enforcement agency [EMD] shall not, at any time, impose duplicative fees or charges on the owner or operator of a solid waste facility." (emphasis supplied) Thus, this section refers specifically to the enforcement authority of CIWMB and the LEA, not a municipality such as the City of Sacramento.

defense asserted by the City was not applicable to the remaining owners. Finally, the owners were each informed of their individual obligation to appeal the Notice and Order; having failed to do so, the Notice and Order became enforceable as to appellant and the Lupsas.

10. All arguments raised by appellant challenging the Notice and Order, that have not been addressed as jurisdictional challenges, are deemed waived by reason of appellant's failure to timely appeal the Notice and Order. These arguments include, but are not limited to:

- A. Laches;
- B. Failure of state agencies to initiate remediation of Waring's Dump for more than 50 years;
- C. Due to the age of Waring's Dump, the site is stable and no remediation is required;
- D. Alleged zoning restrictions that would disallow placing "cover" on the property.

Appellant's contentions/defenses concerning the NOPA

11. Appellant claims that EMD did not comply with PRC section 45011, subdivision (b), by failing to meet with the owners before imposing the Penalty Order. This contention is without merit. PRC section 45011, subdivision (b), states:

(b) Before issuing an order that imposes a civil penalty pursuant to subdivision (a), an enforcement agency shall do both of the following:

(1) Notify the operator of the solid waste facility that the facility is in violation of this division.

(2) Upon the request of the operator of the solid waste facility, meet with the operator of the solid waste facility to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility into compliance by the earliest feasible date.

In this case, the Notice and Order provided notification to appellant that Waring's Dump was in violation of PRC Division 30 and applicable Title 27 regulations. EMD met with appellant numerous times over the two-year period between issuance of the Notice and Order and the issuance of the NOPA in order to gain compliance; and the NOPA itself stated that appellant could request the LEA to schedule a settlement conference, which appellant failed to do (Finding 38).

12. Appellant claimed the NOPA and Penalty Order were defective because neither document contained an explanation of how the penalties were derived. The penalty

calculation was fully explained at the administrative hearing (Findings 63 and 64), and the failure to provide that information in the NOPA did not render that document or the Penalty Order unenforceable.

13. Appellant claims that there cannot be any penalty imposed against Krishna Living Trust because, according to PRC section 48023, subdivision (a), "[i]f the board expends any funds pursuant to this article, the board shall, to the extent feasible, seek repayment from **responsible parties** in an amount equal to the amount expended, a reasonable amount for the board's cost of contract administration, and an amount equal to the interest that would have been earned on the expended funds." (emphasis supplied) Appellant denies that he is a responsible party, since Waring's Dump ceased activities many years before Krishna Living Trust purchased the property. This claim is without merit. The statute cited is irrelevant, since CIWMB is not seeking repayment from appellant; rather, EMD is imposing a penalty.²⁵ Furthermore, the Public Resources Code does not define "responsible party." However, Health and Safety Code section 25323.5, subdivision (a), states that "responsible party" means "those persons described in Section 107(a) of the federal act (42 U.S.C. Sec. 9607(a))." The definition of "covered person" in 42 U.S.C. section 9607(a)(1) includes "owner."

14. Appellant claims that imposition of civil penalties is an inappropriate remedy in this case. According to appellant, once the owners failed to comply with the Notice and Order, CIWMB should have taken action to remediate the site, after determining that the owners were unwilling or unable to provide remediation. In support of his position, appellant cites PRC section 48020, subdivision (b), which states: "The board shall, on January 1, 1994; initiate a program for the cleanup of solid waste disposal sites and for the cleanup of solid waste at codisposal sites where the responsible party either cannot be identified or is unable or unwilling to pay for timely remediation, and where cleanup is needed to protect public health and safety or the environment." Under PRC section 48021, subdivision (b)(1), "[i]n administering the program authorized by Section 48020, the board may expend funds directly for cleanup, provide loans to parties who demonstrate the ability to repay state funds, and provide partial grants to public entities, to assist in site cleanup." And, under PRC sections 48023 and 48023.5, CIWMB is entitled to recover its costs from responsible parties, and such costs or damages constitute a lien upon the real property owned by any responsible party that is subject to the remedial action.

Although appellant correctly states that CIWMB had the option of proceeding with remediation without the consent of the owners, it was not obligated to do so. Under PRC section 48022.5, subdivision (j), "[n]othing in this section is intended to limit the authority of the board, ... pursuant to other provisions of law." Therefore, CIWMB, and the LEA (in this case, EMD), were free to pursue other remedies, including civil penalties, when appellant failed to comply with the Notice and Order, as previously set forth in Legal Conclusion 5.

²⁵ PRC 48023, subdivision (c), provides that "[t]he amount of any cost incurred by the board pursuant to this article shall be recoverable from responsible parties in a civil action brought by the board or, upon the request of the board, by the Attorney General pursuant to Section 40432." (emphasis supplied)

15. Appellant claims that the owners were capable of providing the closure of Waring's Dump; but was prevented from doing so by EMD's unreasonable rejection of appellant's closure plan(s). Appellant further contends that EMD has contributed to the creation of a nuisance on appellant's property by preventing him from performing grading at the site in the absence of an approved closure plan, and disallowing someone to reside at the site to provide security and prevent intruders from coming onto the property. These contentions are not persuasive. Appellant's closure plans were properly rejected by EMD and CIWMB, for the reasons stated in EMD's letters to appellant on July 27, 2006, and September 27, 2006 (Findings 51 and 53). Given the legitimate concern about metals in the soil at Waring's Dump, and the potential exposure of waste in the absence of proper grading, EMD was fully justified in seeking to prevent appellant from grading the site without an approved closure plan which addressed grading and cover of the solid waste. Appellant could have prevented intrusion onto his property by installing a secure fence, which he has failed to do up to and including the date of hearing. Appellant's contention that he should have been allowed to have a person remain on-site to provide security is rejected.

Reasonableness of the Penalty Order

16. Appellant contends that he was "surprised" by the penalty order, because of his belief that the owners were in negotiations with EMD and CIWMB concerning a closure plan to be developed by CIWMB, which appellant believed he would have an opportunity to review, comment on, and possibly incorporate elements into a closure plan that he would propose to remediate the site. Appellant further contended, in the document treated as his Statement of Issues:

The notice of penalty is to discourage the appeal. For the appeals, the notice of penalty has a threat for the retaliation as the future enforcement action.

The Administrative Law Judge interpreted appellant's argument to mean that EMD's offering of a settlement to the owners which would require them to agree to voluntary remediation under AB2136, including the placement of a lien on their property, at the same time that they were served with a NOPA with penalties in excess of \$400,000 against appellant, and \$300,000 against the Lupsas, had an inherently coercive effect, in that a rejection of the settlement meant exposure to liability for collective civil penalties of over \$700,000. At the same time, since they had not seen the closure plan proposed by CIWMB (Finding 48), the owners had no idea about the extent of their financial commitment if they accepted liens on their property.²⁶

²⁶ Appellant also challenged the CIWMB plan as deficient, and claimed that acceptance of the stipulated settlement would expose the owners to liability from neighbors from flow of toxic materials onto adjacent property. This claim is without merit. The plan proposed by SCS Engineers was determined by CIWMB staff to meet minimum closure standards for burn dump sites (Finding 48).

17. With respect to the violations of 27 CCR sections 20530 (Inadequate Site Security) and 20750 (Inadequate Site Maintenance), appellant's contention is not persuasive. Appellant was on notice about the need to maintain and secure the site, and was repeatedly cited by EMD personnel for failure to remediate these deficiencies at every inspection performed on the site between January 2005 and February 2007. Appellant was repeatedly reminded that the Notice and Order was still in effect, and on March 10, 2006, was specifically warned that failure to abate the violations "may result in additional enforcement actions." (Finding 31)

18. With respect to the violations of 27 CCR sections 20650 (Inadequate Grading of Fill Surfaces) and 21100, subdivision (d) (Failure to Implement Closure Activities), the corrective actions to be taken, as specified in the Notice and Order, were to provide and implement a closure plan. As set forth in further detail in Legal Conclusion 19 below, it was not appropriate to impose a civil penalty against appellant at the time of issuance of the NOPA for failure to implement a closure plan. However, starting with the March 10, 2006 inspection of the site conducted by Lisa Todd, it was apparent that appellant was engaged in grading activities in the absence of an approved closure plan (Finding 43). This conduct violated 27 CCR section 20650, concerning proper grading, since the grading could not take place without an approved closure plan in place. Improper grading activities, including the presence of the three backhoes on appellant's property, were in evidence up to and including the date of issuance of the first NOPA (Findings 44, 46, 47, 50, and 57). Thus, EMD was justified in seeking a civil penalty against appellant for violation of 27 CCR section 20650, dating back to Ms. Todd's March 10, 2006 inspection.

19. With respect to appellant's failure to implement closure activities as required by the LEA (27 CCR section 21100, subdivision (d)), appellant's argument has merit. For more than two years, both before and after EMD issued the Notice and Order, EMD and the owners were discussing the possibility that the CIWMB would provide a closure plan to remediate the Waring's Dump site, under the AB2136 program (Findings 21, 36, 38, 39, 53, and 60). During that time, appellant authorized access to his property for purposes of CIWMB's site investigation (Finding 42), and he submitted his own (albeit inadequate) closure plans (Findings 45 and 49). Based upon representations made by Lisa Todd in her March 10, 2006 and June 19, 2006 Inspection Reports (Findings 43 and 50), and in meetings with the owners, a reasonable person would have been justified in believing that he was going to be given an opportunity to review CIWMB's closure plan before deciding whether or not to accept remediation pursuant to the AB2136 program, and before civil penalties would be imposed for failure to submit and implement a closure plan. This is true notwithstanding the fact that appellant made it clear from the outset that he would not accept a lien on his property (Findings 21 and 38). At the time appellant filed his appeal from the Penalty Order, he had no way of knowing that the total projected cost to remediate the entire Waring's Dump site was less than the amount of the proposed civil penalty assessed against appellant (Findings 48 and 58). The plans and cost estimate were available to CIWMB (and presumably to EMD) from August 2006 (Finding 48). The failure to disclose this information to appellant in a timely fashion, as well as CIWMB's overall delay in developing a remediation plan after access to the property was granted by the owners in October of 2005,

is considered as a substantial factor in mitigation of the proposed penalty. Under all of the circumstances set forth above, it would be inappropriate to impose a civil penalty against appellant for violation of 27 CCR section 21100, subdivision (d) (Failure to Implement Closure Activities).

Amount of Civil Penalties

20. 27 CCR section 20530 (Inadequate Site Security). As set forth in Finding 64.A., EMD seeks a civil penalty for this violation of \$125 per day (base amount), which is two and one-half percent of the maximum \$5,000 per day authorized by PRC section 45011. This amount reflects the nature, circumstances, extent, and gravity of the violation, taking into account protection of public health and safety and the environment (PRC section 45016, subdivision (a)). By failing to secure the site, appellant has exposed the public to risk from exposure to toxic materials in the soil. Although having more than two years to do so, appellant has not corrected the violation, and the violations/circumstances leading to the violations were not due to circumstances beyond the reasonable control of the violator (PRC section 45016, subdivisions (b) and (f)). EMD applied a multiplier of 20 percent to the base amount, because appellant demonstrated a chronic pattern of noncompliance with applicable laws and regulations, and his conduct was intentional (PRC section 45016, subdivisions (c) and (d)). EMD calculated the penalty from February 12, 2005, the date the Notice and Order became final, to December 31, 2006, a period of 687 days (Finding 64). Under the circumstances, a civil penalty of \$103,050 for this violation is appropriate.²⁷

21. 27 CCR section 20750 (Inadequate Site Maintenance). As set forth in Finding 64.C., EMD seeks a civil penalty for this violation of \$100 per day (base amount), which is two percent of the maximum \$5,000 per day authorized by PRC section 45011. Applying the factors of PRC section 45016, this amount reflects the somewhat lesser risk to public health and safety and the environment, when compared to the failure to provide adequate site security (Legal Conclusion 20). Again, appellant allowed this condition to remain uncorrected for two years, demonstrating a chronic pattern of noncompliance that was unexcused by circumstances not under his control (PRC section 45016, subdivision (c)). EMD applied a 10 percent multiplier to the base amount, and calculated the penalty for this violation from February 12, 2005, the date the Notice and Order became final, to December 31, 2006, a period of 687 days (Finding 64). However, in this instance, the Notice and Order gave appellant until February 28, 2005 to correct this violation. Thus, the period of violation for purposes of imposing the civil penalty was 672 days. Under the circumstances, a civil penalty of \$73,920 for this violation is appropriate.²⁸

22. 27 CCR section 20750 (Inadequate Grading of Fill Surfaces). As set forth in Finding 64.B., EMD seeks a civil penalty for this violation of \$150 per day (base amount), which is three percent of the maximum \$5,000 per day authorized by PRC section 45011. Applying the factors of PRC section 45016, this amount reflects the somewhat greater risk to

²⁷ \$125 per day x 687 days = \$85,875. \$85,875 + (.20 x \$85,875) = \$103,050.

²⁸ \$100 per day x 672 days = \$67,200. \$67,200 + (.10 x \$67,200) = \$73,920.

public health and safety and the environment, when compared to the failure to provide adequate site security (Legal Conclusion 20). As set forth in Legal Conclusion 18, this became a continuing violation as of March 10, 2006, the date that Lisa Todd noted the presence of three backhoes on the property, and evidence that grading activities had taken place. Appellant allowed this condition to remain uncorrected for more than nine months, in defiance of EMD's efforts to have the backhoes removed. This demonstrated a chronic pattern of intentional noncompliance that was unexcused by circumstances not under his control (PRC section 45016, subdivisions (c) and (d)). EMD appropriately applied a 20 percent multiplier to the base amount. The period of violation for purposes of imposing the civil penalty was 297 days (March 10, 2006 to December 31, 2006). Under the circumstances, a civil penalty of \$53,460 for this violation is appropriate.²⁹

23. 27 CCR section 21100, subdivision (d) (Failure to Implement Closure Activities). For the reasons set forth in Legal Conclusion 19, it was not appropriate for EMD to impose a civil penalty for this violation as of the date the NOPA was issued.

24. Appellant contends that the imposition of civil penalties in the amount sought by EMD, was excessive by a "reasonable person" standard, and was designed to bring financial ruin down upon appellant, or to coerce him into accepting EMD's settlement offer, which would result in a lien being placed on his property. Appellant's contention is not persuasive. Given the length of time appellant allowed the property to be unsecured and improperly maintained, and given the risk to the public health and safety from access to a burn dump site upon which junk and debris had been deposited, and where appellant had engaged in improper grading activities, the revised civil penalties, in the total amount of \$230,430, were reasonable and appropriate.

Conclusion

25. PRC sections 43209 and 45000, and 14 CCR sections 18304 and 18304.1, authorize EMD to issue enforcement orders for violations of the PRC and regulations adopted pursuant to Division 30 of the PRC. PRC section 45011 authorized EMD to assess penalties for failure to comply with the enforcement order (Findings 1 and 2, and Legal Conclusions 5 and 6).

26. Pursuant to PRC section 45011, cause exists to impose a civil penalty on appellant for failure to correct the violation of 27 CCR section 20530, as set forth in EMD's Notice and Order, dated January 28, 2005, by reason of Findings 22-24, 28-34, 58, and 61, and Legal Conclusions 17, 20, and 25. A civil penalty in the amount of \$103,050 is reasonable and appropriate (Findings 63-64, and Legal Conclusions 20 and 24).

27. Pursuant to PRC section 45011, cause exists to impose a civil penalty on appellant for failure to correct the violation of 27 CCR section 20650, as set forth in EMD's Notice and Order, dated January 28, 2005, by reason of Findings 22-24, 43-44, 46-47, 50, 57-

²⁹ \$150 per day x 297 days = \$44,550. $\$44,550 + (.20 \times \$44,550) = \$53,460$.

58, and 61, and Legal Conclusions 18, 22, and 25. A civil penalty in the amount of \$53,460 is reasonable and appropriate (Findings 63-64, and Legal Conclusions 22 and 24).

28. Pursuant to PRC section 45011, cause exists to impose a civil penalty on appellant for failure to correct the violation of 27 CCR section 20750, as set forth in EMD's Notice and Order, dated January 28, 2005, by reason of Findings 22-24, 28-34, 58, and 61, and Legal Conclusions 17, 21, and 25. A civil penalty in the amount of \$73,920 is reasonable and appropriate (Findings 63-64, and Legal Conclusions 21 and 24).

29. No cause exists to impose a civil penalty on appellant pursuant to PRC section 45011, for failure to correct the violation of 27 CCR section 21100, subdivision (d), as set forth in EMD's Notice and Order, dated January 28, 2005, by reason of Findings 36-42, 45, 48-49, and 51-56, and Legal Conclusions 19 and 23.

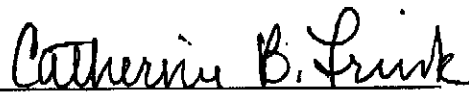
30. All arguments of the parties not specifically addressed herein were considered and are rejected.

ORDER

1. The appeal of Krishna Living Trust and Raghvendra Singh from the Notice of Penalty Assessment and Penalty Order issued on March 7, 2007 in regard to Waring's Dump, SWIS #34-CR-5017, APNs 038-0202-001, 038-0812-005, and 038-0182-010, is granted in part and denied in part, pursuant to Legal Conclusions 26, 27, 28, and 29.

2. Appellant Krishna Living Trust is ordered to pay the sum of \$230,430 as and for a Civil Penalty to the Sacramento County Environmental Management Department, State of California.

Dated: 9-4-07


CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF RIGHT TO APPEAL

Pursuant to Division 30 of the Public Resources Code, you are hereby notified of your right to appeal the Decision issued in this matter, as follows:

§ 45002. Notice of right to appeal required with issuance of order

An order issued pursuant to this part or Part 4 (commencing with Section 43000) shall provide the person subject to that order with a notice of that person's right to appeal pursuant to Part 4 (commencing with Section 43000) and Part 6 (commencing with Section 45030).

§ 45030. Appeals; Time limitations; Requirements to commence; Applicable procedures

(a) A party to a hearing held pursuant to Chapter 4 (commencing with Section 44300) of Part 4 may appeal to the board to review the written decision of the hearing panel or hearing officer or to review the petitioner's request in the instance of a failure of a hearing panel or hearing officer to render a decision or consider the request for review, or a determination by the governing body not to direct the hearing panel or hearing officer to hold a public hearing, under the following circumstances:

(1) Within 10 days from the date of issuance of a written decision by a hearing panel or hearing officer.

(2) If no decision is issued, within 45 days from the date a request for a hearing was received by the enforcement agency for which there was a failure of a hearing panel or hearing officer to render a decision or consider a petitioner's request pursuant to Section 44310.

(b) An appellant shall commence an appeal to the board by filing a written request for a hearing together with a brief summary statement of the legal and factual basis for the appeal.

(c) Within five days from the date the board receives the request for a hearing, the board shall schedule a hearing on the appeal and notify the appellant and all other parties to the underlying proceeding of the date of the board hearing.

(d) The board shall hear the appeal within 60 days from the date the board received the request for the appeal.

(e) The board shall conduct the hearing on the appeal in accordance with the procedures specified in Article 10 (commencing with Section 11445.10) of Chapter 4.5 of Part 1 of the Government Code.

PROOF OF SERVICE

I, **Cindy Watts**, declare as follows: I am over 18 years of age and have no interest in the action within; my place of employment and business address is:

**Office of Administrative Hearings
2349 Gateway Oaks, Suite 200
Sacramento, CA 95833-4231**

On **September 5, 2007**, I served a copy of the following entitled action:

DECISION - OAH CASE NO. - N2007040062

to each of the person(s) named below, at the address set out next to each name, by the following method:

Mr. John H. Reed, Deputy County Counsel
County of Sacramento
700 H Street, Suite 2650
Sacramento, CA 95814

Mr. Raghvendra Singh
P.O. Box 162783
Sacramento, CA 95816

- ☒ **US MAIL** — by enclosing the action in a sealed envelope and placing the envelope for collection and mailing on that date and at the Office of Administrative Hearings, City of Sacramento, County of Sacramento, State of California, following ordinary business practices. I am readily familiar with the Office of Administrative Hearings' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

XX Certified Mail and Certified Mail and Regular Mail to Mr. Singh

- ☐ **FACSIMILE TRANSMISSION** — by personally transmitting to the above-named person(s), who has previously agreed to receive documents via facsimile transmission, to the facsimile number(s) shown above, on the date and time listed below, from facsimile machine number, pursuant to California Rules of Court, rules 2003-2008, Government Code section 11440.20, and California Code Regulations, title 1, section 1008, subdivision (d). A true copy of the above-described documents(s) was transmitted by facsimile transmission and the transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached to this proof of service.

- ☐ **MESSENGER SERVICE** — by causing such envelope(s) to be delivered to the office of the addressee(s) listed above by:

- ☐ **PERSONAL SERVICE** — by causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s) listed above, pursuant to California Code Regulations, title 1, section 1008, subdivision (b)

Name of Person to whom document delivered:

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and this Declaration was executed at **Sacramento, California** at **9:54 AM** on the **5** of **September**, 2007. Cindy Watts

Cindy Watts